

1 RON BENDER (SBN 143364)
2 rb@lnbyb.com
3 BETH ANN R. YOUNG (SBN 143945)
4 bry@lnbyb.com
5 KRIKOR J. MESHEFEJIAN (SBN 255030)
6 kjm@lnbyb.com
7 LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.
8 10250 Constellation Boulevard, Suite 1700
9 Los Angeles, California 90067
10 Telephone: (310) 229-1234
11 Facsimile: (310) 229-1244
12 Attorneys for Castellino Villas, A K.F. LLC

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

13 In re: Castellino Villas, A K.F. LLC) Case No. CV 12-7282-JFW
14)
15 Picerne Construction Corp. dba)
16 Camelback Construction,) **STATEMENT OF DECISION**
17) **GRANTING APPELLEE'S**
18 Plaintiff/Appellant,) **MOTION FOR ATTORNEYS'**
19) **FEES**
20 v.)
21)
22 Castellino Villas, A K.F. LLC,)
23) Judge: The Honorable John F.
24 Defendant/Appellee) Walter
25)
26)
27)
28)

1 The Court has considered the motion (“Motion”) filed by Appellee Castellino
 2 Villas, A K.F. LLC (“Appellee”), filed on December 6, 2016, at Docket No. 43, for
 3 an order directing Appellant Picerne Construction Corp. dba Camelback
 4 Construction (“Appellant”) to pay the fees of Levene, Neale, Bender, Yoo & Brill
 5 L.L.P. (“LNBYB”) in connection with the appeals of the Bankruptcy Court’s order,
 6 which order was affirmed by this Court and the Ninth Circuit Court of Appeals,
 7 Appellant’s opposition to the Motion, and Appellee’s reply to Appellant’s
 8 opposition, along with all other evidence and pleadings submitted in support of, and
 9 in opposition to, the Motion. The total amount of fees requested by Appellee is
 10 \$113,115.50. After due consideration of the Motion, Appellant’s opposition to the
 11 Motion, and Appellee’s reply to the opposition, the Court hereby orders Appellant
 12 to pay to Appellee and deliver to Appellee’s counsel of record the sum of
 13 \$113,115.50 within thirty (30) days of entry of the Order granting the Motion.

14 **STATEMENT OF RELEVANT FACTS**

15 On September 6, 2016, the United States Court of Appeals For the Ninth
 16 Circuit issued its opinion affirming the order of the United States Bankruptcy Court
 17 for the Central District of California denying Picerne’s “Motion To Confirm State
 18 Court’s Authority To Award Attorneys’ Fees And Costs Caused By The
 19 Reorganized Debtor After Plan Confirmation” (the “Bankruptcy Motion”) filed by
 20 Picerne in the Bankruptcy Court. *See* Declaration Of Beth Ann R. Young In
 21 Support Of Appellee’s Motion For Attorneys’ Fees [Docket No. 45] (“Young
 22 Decl.”) ¶ 4.

23 The Motion was filed by Picerne after the Superior Court of California,
 24 County of Sacramento (the “State Court”) denied Picerne’s motion for an award of
 25 attorneys fees and litigation costs and expenses “without prejudice to Picerne’s
 26 ability to renew the motion after seeking a determination from the United States
 27 Bankruptcy Court as to the parties’ dispute over the breadth and meaning of the
 28

1 Settlement Agreement on this point.” Young Decl. ¶ 5. Thereafter, Picerne filed its
2 Bankruptcy Motion in the Bankruptcy Court. *Id.*

3 The Bankruptcy Motion requested that the Bankruptcy Court “issue an Order
4 confirming that the State Court may enter an award of attorneys fees in Picerne’s
5 favor against the reorganized debtor Castellino Villas LLC without violating the
6 Settlement Agreement or Reorganization Plan.” *See* Young Decl. ¶ 6. The
7 Bankruptcy Motion was denied and Picerne appealed the Bankruptcy Court’s order
8 denying the Bankruptcy Motion to this Court, which affirmed the Bankruptcy
9 Court’s order. Picerne then further appealed to the Ninth Circuit, which also
10 affirmed the Bankruptcy Court’s order. *Id.*

11 In the Bankruptcy Motion, the Bankruptcy Court (and then on appeal, the
12 District Court and then the Ninth Circuit Court of Appeals), was asked, by Picerne,
13 to enforce, construe, or interpret rights granted under that certain Settlement
14 Agreement and Mutual Release (the “Agreement”) between Picerne and the
15 Reorganized Debtor. *See* Young Decl. ¶ 7, and Exhibit 2 to Young Decl.

16 Section 27 of the Agreement provides that “[i]n the event that any party
17 hereto shall institute any action or proceeding to enforce, construe, or interpret any
18 rights granted hereunder, the prevailing party in such action or proceeding shall be
19 entitled, in addition to any other relief granted by the applicable court or other
20 applicable judicial body, to reasonable attorney’s fees and court costs.” *See*
21 Agreement, § 27, Exhibit 2 to Young Decl.

22 On October 4, 2016, the Reorganized Debtor timely filed an application for
23 its attorney’s fees in the Ninth Circuit. Picerne objected, and the Reorganized
24 Debtor responded to Picerne’s objection. *See* Young Decl. ¶ 10. On October 31,
25 2016, the Ninth Circuit issued an order transferring the Reorganized Debtor’s
26 application for attorney’s fees to this District Court (See, [Cummings v. Connell](#), 402
27 [F.3d 936, 948](#) (9th Cir. 2005) (“Ninth Circuit Rule 39-1.8 authorizes us to transfer a
28 timely-filed fees-on-appeal request to the district court for consideration”). *Id.* On

1 November 7, 2016, the Ninth Circuit issued an order directing the Reorganized
2 Debtor to file a motion for attorney's fees in this Court. *Id.* The Ninth Circuit did
3 not deny the Reorganized Debtor's motion for attorney's fees, but rather merely
4 transferred disposition of the motion for attorney's fees to the District Court. *Id.*

5 The Reorganized Debtor's attorneys who handled this matter are at LNBYB.
6 In connection with this matter (i.e., the opposition to Picerne's Bankruptcy Motion
7 and defense of the two appeals to the District Court and Ninth Circuit Court of
8 Appeals), during the period of July 18, 2012 (the date that Picerne's Bankruptcy
9 Motion was filed) through and including September 7, 2016 (the day after the Ninth
10 Circuit issued its opinion affirming the Order) LNBYB billed a total of 222.5 hours
11 and incurred a total of \$113,115.50 of fees. *See* Young Decl., Exhibit 3. The
12 detailed listing attached as Exhibit 3 to the Young Decl. includes the date LNBYB
13 rendered the service, a description of the service, the amount of time spent and a
14 designation of the person who rendered the service for the period of time. Also
15 included in Exhibit 3 to the Young Decl. is a summary of the hours and fees
16 charged by each of LNBYB's attorneys that performed services for the Reorganized
17 Debtor. Also included in Exhibit 3 to the Young Decl. is a breakdown of time
18 entries into the activity codes maintained by LNBYB (as applicable to this matter,
19 the activity codes used by LNBYB are "Case Administration", "Plan and
20 Disclosure Statement", "Other Litigation", and "Miscellaneous").

21 The services rendered by LNBYB in connection with the applicable matters
22 included successfully opposing Picerne's Bankruptcy Motion, which the
23 Bankruptcy Court denied, and successfully handling both of Picerne's appeals to
24 both the District Court and the Ninth Circuit Court of Appeals which each Court
25 affirmed the Order. LNBYB prepared briefs, reviewed Picerne's briefs, researched
26 case law, reviewed the case record, prepared for oral arguments, presented oral
27 argument at the Ninth Circuit Court of Appeals, and ultimately, successfully
28 defended against the Bankruptcy Motion and each of Picerne's two appeals.

DISCUSSION

A. The Motion Is Consistent With The Ninth Circuit's Ruling

Appellee's request for its attorneys' fees is consistent with the Ninth Circuit's ruling. The Ninth Circuit ruled that Appellant's pre-bankruptcy claim for attorneys' fee was ***discharged*** by Castellino's confirmed plan of reorganization (the "Confirmed Plan"). However, the discharge that Appellee received pursuant to the Confirmed Plan does not apply to Appellant, and does not bar the Motion.

Specifically, the Ninth Circuit held that Appellant's claim for attorneys' fees based on disputes regarding the pre-petition construction contract between Appellant and Appellee "was discharged when the bankruptcy court confirmed Castellino's plan." See [*Picerne Construction Corp. dba Camelback Construction v. Castellino Villas, A K.F. LLC \(In re Castellino Villas, A K.F. LLC\)*, 2016 WL 4608146, at *6 \(9th Cir. Sept. 6, 2016\)](#).

11 U.S.C. § 1141(d)(1) provides that "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan (A) discharges ***the debtor*** from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title[.]" 11 U.S.C. § 1141(d)(1). By its terms, the discharge provision in section 1141 of the Bankruptcy Code applies to Appellee, not other parties such as Appellant.

Moreover, neither the Confirmed Plan nor the plan confirmation order provide otherwise. Paragraph 9 of the plan confirmation order specifically describes the "discharge" as follows:

Discharge. Except as otherwise provided in the Plan or in this Order, all property distributed under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all claims of any nature whatsoever against the Debtor, and the Reorganized Debtor and/or any of their assets, and upon the Effective Date, the

Debtor shall be deemed discharged and released under Section 1141(d)(1)(A) of the Bankruptcy Code from any and all debts except as provided in the Plan. This Order is a judicial determination of discharge of all liabilities of the Debtor except as provided in the Plan. The Debtor will receive a discharge under the Plan pursuant to and in accordance with the provisions of Section 1141 of the Bankruptcy Code because there has not been a liquidation of all or substantially all of the property of the Debtor's estate and because the Reorganized Debtor will be continuing with the Debtor's current business operations.

Appellant did not receive a discharge; rather, only Appellee received a discharge, which is why Appellant's attempt to recover sums in excess of what was provided for under the Confirmed Plan failed. Accordingly, Appellee's requested relief is not contrary to the Ninth Circuit's ruling.

B. Appellant's Bankruptcy Motion and Appeals Were Instituted To Enforce, Construe Or Interpret Rights Granted Under The Settlement Agreement

Appellant initially filed a motion for attorney fees in the State Court based upon the construction agreement between the parties. That motion was denied "without prejudice to [Appellant's] ability to renew the motion after seeking a determination from the United States Bankruptcy Court as to the parties' dispute over the breadth and meaning of the Settlement Agreement on this point" (as stated by the State Court in its ruling).

Then, Appellant took the voluntary step of requesting the Bankruptcy Court to "issue an Order confirming that the State Court may enter an award of attorneys fees in Picerne's favor against the reorganized debtor Castellino Villas LLC *without violating the Settlement Agreement or Reorganization Plan.*" (Emphasis added.) That motion was denied and Appellant appealed the Bankruptcy Court's order denying that motion to this Court, which affirmed the Bankruptcy Court's order. Appellant then further appealed to the Ninth Circuit, which also affirmed the order.

Appellant's motion in the Bankruptcy Court, and Appellant's subsequent appeals to this Court and the Ninth Circuit, are proceedings to enforce, construe or interpret rights under the Settlement Agreement and the Confirmed Plan which incorporated the Settlement Agreement. The italicized language taken from Appellant's underlying motion defeats Appellant's argument to the contrary. Indeed, Appellant's arguments to the Bankruptcy Court, this Court, and the Ninth Circuit necessarily implicated an analysis of the Settlement Agreement (which settled, characterized and provided for the treatment of Appellant's claims under the Confirmed Plan) and the plan confirmation order (which effectuated the treatment of Appellant's settled claims).

Specifically, the first issue argued by Appellant was whether "its claim for attorneys' fees arising from litigation in state court arose after Appellee filed its petition in bankruptcy *and therefore was not discharged by the confirmation of Castellino's plan of reorganization[;]*" and the second issue argued by Appellant was whether "its settlement agreement with [Appellee] released only 'existing claims' and not claims for attorneys' fees incurred after the settlement agreement was approved by the court." All of Appellant's arguments with respect to these issues have been rejected many times now.

Appellant also contends that Appellee's defenses to Appellant's motion in the Bankruptcy Court cannot bring the disputes between the parties within the scope of §27 of the Settlement Agreement.¹ Picerne is incorrect as a matter of both fact and law on both arguments.

¹ The Settlement Agreement provides in pertinent part, that "[i]n the event that any party hereto shall institute any action or proceeding to enforce, construe, or interpret any rights granted hereunder, the prevailing party in such action or proceeding shall be entitled, in addition to any other relief granted by the applicable court or other applicable judicial body, to reasonable attorney's fees and court costs." See Settlement Agreement, § 27.

Picerne cites to the case of *Exxess Electronixx v. Heger Realty Corp.*, 64 Cal. App. 4th 698 (1998) for the proposition that Castellino cannot bootstrap an argument that a defense it raised to the request for relief set forth by Picerne—that the award of attorney’s fees was barred by the Settlement Agreement—brings the bankruptcy court Motion, and subsequent proceedings, within the scope of the clause.” (See, Appellant’s opposition at page 12.) Appellant is wrong. In *Windsor Pacific LLC v. Samwood Co., Inc.*, (2013) 213 Cal.App. 4th 263, 274, the Court of Appeal expressly rejected the notion that the successful defense of an action did not trigger application of a prevailing party provision, holding that the words “action or proceeding,” used in accordance with their ordinary and popular sense, encompass the entire action or proceeding, including both the complaint and any responsive pleading, such as an answer.

Appellee’s appeal did in fact constitute an action or proceeding thus, triggering the application of the prevailing party provision of the Settlement Agreement and plan confirmation order, and there is no question that Appellant’s successful defense to the appeal absolutely triggered the application of the prevailing party provision.

C. Reasonableness Of Hourly Rates

A reasonable hourly rate is presumptively the rate the marketplace pays for the services rendered. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 109 S.Ct. 2463, 2469 (1989); *Burgess v. Klenske (In re Manoa Finance Co., Inc.)*, 853 F.2d 687, 691 (9th Cir.1988).

The hourly rates of Appellee’s attorneys and paraprofessionals are reasonable and appropriate in the relevant community and in view of the extraordinarily contentious and difficult circumstances of this case, as well as the overall success. The rates were negotiated at arms-length by Appellee and LNBYB. Appellee selected LNBYB as its counsel because of Appellee’s confidence in LNBYB’s ability to successfully deal with the issues related to the matters in question.

1 LNBYB's hourly rates are very reasonable in light of the complex matters that
 2 LNBYB handles, including in connection with the matters at issues herein.

3 **D. All Of The Requested Fees Are Supported**

4 Appellant argues that "even if the Court were inclined to find Castellino has
 5 some limited basis for an award of fees incurred for enforcing some right granted
 6 under the Settlement Agreement, the amount of fees requested by Castellino is not
 7 supportable" and "[a]ny recovery should be limited to a de minimus amount." *See*
 8 Appellant's opposition, page 10, lines 14 - 17. The Court disagrees.

9 First, Appellant contends that Appellee may only ask for the attorney fees
 10 incurred after Appellant filed the Ninth Circuit appeal. Ninth Circuit Rule 39-1.6
 11 (b), titled "Request for Attorneys Fees" provides, in relevant part, that "[a] request
 12 for an award of attorneys fees must be supported by a memorandum showing that
 13 the party seeking fees is legally entitled to them and must be accompanied by Form
 14 9 (appended to these rules) or a document that contains substantially the same
 15 information[.]" Appellee complied with the Ninth Circuit Rule, which is not
 16 limited to only those fees incurred after an appeal to the Ninth Circuit. Indeed, the
 17 plain language of the rule does not limit fee requests to only those incurred during
 18 the appeal process.

19 Second, Appellant contends that "Castellino has made no showing of fees
 20 apportioned to litigation of any right under the Settlement Agreement" and that any
 21 award of fees must be de minimus because "Castellino's Answering Brief on this
 22 appeal devoted approximately one page of its argument to Castellino's contention
 23 that the Settlement Agreement limited Picerne's recovery of attorney's fees." *See*
 24 Appellant's opposition, page 12, line 5 – page 18, line 25.

25 However, all of the time Appellee has spent in defeating Appellant's motion
 26 in the Bankruptcy Court, and Appellant's appeals, was spent demonstrating why
 27 and how the Settlement Agreement and the Confirmed Plan precluded Appellant
 28 from seeking attorneys' fees based upon the construction contract, and why and

1 how the Settlement Agreement and the Confirmed Plan themselves demonstrated
2 that Appellee had not “returned to the fray” and how Appellant’s claim was
3 addressed and discharged pursuant to the Settlement Agreement incorporated into
4 the Confirmed Plan.

5 Moreover, while apportionment may be appropriate in certain limited
6 circumstances such as when a prevailing party wins on most, but not all issues or
7 disputes, such is not the case here, where Appellee prevailed against Appellant in
8 every respect. See [*In re Gorina*, 296 B.R. 23, 32 \(Bankr. C.D. Cal. 2002\)](#).

9 Moreover, here, apportionment is wholly inappropriate, given that the issues
10 determined (all in favor of Appellee) are so interrelated. See *id.* (“Where the issues
11 are so interrelated that it is impossible to separate them into claims for which fees
12 are and are not awardable, no apportionment need be made.”)

13 CONCLUSION

14 For the reasons set forth herein, the Court orders Appellant to pay Appellee’s
15 requested attorneys’ fees in the sum of \$113,115.50 and deliver such payment to
16 LNBYB within thirty (30) days of the entry of the Order granting the Motion.

17 IT IS SO ORDERED.

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19 DATED: January 4, 2017

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22 JOHN F. WALTER
23 UNITED STATES DISTRICT JUDGE
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